80-65

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. ————

PHILIP E. STEVENS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FIRST APPELLATE DISTRICT CLERMONT COUNTY, OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FIRST APPELLATE DISTRICT CLERMONT COUNTY, OHIO

PETITION

Petitioner, Phillip E. Stevens, respectfully petitions the Court that a Writ of Certiorari issue to review the judgment and decision of the Court of Appeals, First Appellate District, Clermont County, Ohio, rendered on December 19, 1979.

Petitioner appealed the judgment of the Court of Appeals to the Supreme Court of Ohio which, *sua sponte,* dismissed the appeal for the reason that no substantial constitutional question existed. This dismissal was entered on April 3, 1980. Rehearing was not requested.

OPINIONS BELOW

The Supreme Court of Ohio did not render an opinion. Its judgment dismissing the appeal *sua sponte* is attached hereto as Appendix A. The opinion of the Court of Appeals, not reported, is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1979. The judgment of the Supreme Court of Ohio, dismissing petitioner's appeal, was entered on April 3, 1980. Rehearing was not sought. The Court of Appeals decision is not in accord with the decisions of this court.

The petitioner contends that 28 U.S.C. § 1257 (3) confers on this court jurisdiction to review the judgment in question by writ of certiorari.

THE QUESTION PRESENTED FOR REVIEW

I. Whether exclusion of evidence was violative of Fourteenth Amendment "due process" considerations where such evidence was offered to establish that petitioner acted with a degree of culpability less than that of "knowingly" as required by the statute, and where such evidence tended to establish an affirmative statutory defense to the crime charged, and was not otherwise excludable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF FACTS

On April 5, 1978 petitioner was indicted for carrying a concealed weapon. Petitioner was the owner/operator of a Chili parlor in the City of Milford, the owner of two homes, one of which was a fishing and hunting lodge, and the owner-manager of an auto body repair shop.

Petitioner after the conclusion of his duties at the chili parlor went to the auto body shop and prepared the bank run for both businesses. As was his custom when making a banking run, because of large sums of cash he carried, he also carried a hand gun.

While at the auto body shop, during a telephone conversation he informed a friend that rather than bother the police, he would stop by her apartment after making the bank run to ask that a neighbor turn down a loud stereo.

After he made the bank deposit he went to the friend's apartment and rather than allow the gun to remain on the seat of the truck which could not be locked, he placed it in his belt.

Subsequently the gun was seen in his hand following his talk with the occupants of the apartment from which the loud stereo emanated.

Petitioner was arrested and thereafter readily and repeatedly stated that he had been advised by various police officers and departments that it was lawful for him to carry the gun concealed, in view of the factual circumstances in which he was involved.

At trial, petitioner offered the testimony of three police officers, including police chiefs, all of whom, if allowed, would have testified that the petitioner had sought advice concerning his right to carry a concealed weapon. Each would have testified (this was preserved by proffer at trial) that they had been informed by petitioner and were also familiar with the petitioner's business activities, his early morning banking habits and of the break-ins and thefts at his hunting and fishing lodge and that they had advised the petitioner that under the circumstances and absent his conviction of felony crimes, he could carry a weapon concealed at those critical times for the protection of his home, property and during his business transactions such as banking.

The police officer witnesses offered by the petitioner were not permitted to testify regarding anything that they told petitioner about his carrying the gun concealed because the trial judge stated that he was not aware of any case law that said that one may use as a defense to a concealed weapons charge the legal advice given by police officers. Only attorneys, in the opinion of the judge, could give such advice.

Petitioner testified that he was driving a truck, due to heavy snow conditions and that he takes the gun on the seat of the truck when he banks and when he checks the fishing and hunting camp. The camp had been the object of previous break-ins and thefts. He kept axes and hatchets at the camp and did not want to become the victim of his own tools. He testified that he did not leave the gun in the truck because he could not lock the door and did not want to leave it where children could get their hands on a loaded weapon.

A prosecution witness, Police Officer Michael Burns, testified that petitioner stated that he carried the gun be-

cause "he owned Skyline Chili and a home, along with, I believe he said, two homes, and he said he always carries it. He said he had permission from other departments to carry it in such a manner."

The petitioner testified that he did not think that he could carry the gun all the time. He did think that he had the right to carry it when he checked the camp and under the circumstances to carry it into the apartment building rather than to allow it to be a hazard to children.

REASONS FOR GRANTING THE WRIT

The Court of Appeals by allowing the conviction to stand has decided that the exclusion of state of mind witnesses regarding the element of knowledge to commit a crime, is not within the protection of the due process of law clause and has decided the question in a way probably not in accord with applicable decisions of this Court.

In its opinion the Court of Appeals stated:

> "Defendant claims that this excluded evidence (the three police officers' testimony concerning Defendant's attempt to ascertain the manner and means in which he could lawfully carry a weapon) was crucial to his position that he did not have the culpable mental state required for conviction of carrying a concealed weapon. That culpable mental state is "knowingly", which amounts to an awareness that his conduct was probably of a certain nature or that certain circumstances probably existed. R.C. 2923.12; R.C. 2901.22 (B). The exclusion of the "advice" evidence was not prejudicial to Defendant because that advice was not relevant to the essential elements of the offense. Whatever advice the police officers gave the Defendant about carrying a weapon could not cause him to be less aware or more aware that he was carrying a weapon concealed on his person."

It is important to make the distinction initially between possession of contraband and possession of a weapon which is concealed. Contraband has been traditionally defined as goods possessed against some law or treaty, (Black's Law Dictionary, Revised 4th Edition, West Publishing Company, 1968) and in its more modern definition as any item of goods, the possession of which is illegal. This is distinguishable from possession of a concealed weapon, since possession of the weapon itself, concealed or unconcealed, in and of itself does not constitute an offense in all circumstances. There being exceptions built into the concealed weapon statute describing circumstances under which such possession does not constitute an offense. This distinction is important because it reflects on the apparent intention of the legislature to make the element of mens rea or scienter a necessary part of the offense of carrying a concealed weapon. R.C. 2923.12 (A) provides that no person shall "knowingly" carry or have a concealed weapon on his person. Such knowledge is defined in terms of a person's discernment or awareness of the probable nature or results of his conduct, or that particular circumstances probably exist. Put another way, regardless of what purpose a person may have in mind he is said to act "knowingly" with respect to his conduct when he is aware that such conduct will probably cause a certain result or will probably be of a certain nature and when he is aware that such circumstances probably exist. (R.C. 2901.22 (B), Anderson's Ohio Criminal Practice and Procedure, Mental States, Section T 51.3 (A)). The element of "knowingly" as provided by the legislature in this offense makes the element of scienter or guilty knowledge necessary to the sustaining of a conviction for the offense of carrying a concealed weapon. This conclusion is supported by the fact that the legislature saw fit, in drafting the statute, to in-

clude a number of circumstances under which such possession was not unlawful. (R.C. 2923.12 (C) (1-4).

Petitioner does not suggest that his conduct in questioning three separate police officials, constitutes, in and of itself, a defense to the concealed weapon charge; what he suggests is that he should have been permitted to introduce evidence tending to show his good faith and lack of guilty knowledge with respect to the carrying of the weapon at the time he is alleged to have concealed it on his person. This would include, by inference, not only his mental state precisely at the time, but all testimony tending to show his mental state with respect to his generally carrying the weapon, since there was considerable testimony that under certain circumstances he did see fit to carry the weapon in a lawful manner for his own protection.

By excluding this testimony, the trial Judge effectively left the jury only with those impressions concerning the precise time in which he is accused of having the weapon concealed, i.e. during the confrontation at the West apartment. This evidence, considered alone, tends to show that petitioner concealed the weapon on his person for the purpose of taking it to the West apartment should it be needed. The jury, without a full consideration of the background of petitioner's actions, was able to reach this conclusion, apparently without any difficulty.

Petitioner suggests that the element "knowingly" has to do with his intentions at the time he put the weapon on his person, not with respect to any events which took place thereafter since the element of "knowingly" goes to the concealment, not to anything that may have been done with the weapon later. Petitioner was not charged in this case with assault involving the weapon, or with any threats or use of the weapon itself, merely with the concealed possession of it.

By inference, since the state of mind of the Petitioner is a key element in the offense, if we consider "knowingly" to be, in effect, an indication that the actor must have some guilty knowledge in concealing the weapon, the jury, in order to convict, must have believed that at the time he put the weapon in his belt, and concealed it, he had some criminal intent or guilty knowledge. Otherwise, the interpretation of the statute as made by the Court of Appeals tends to make the weapon itself contraband, there being no need to make a determination as to the intent of petitioner at the time he concealed the weapon. In effect, what has happened in this case, is that the petitioner was convicted because of what he did with the weapon at the time this incident took place, not his carrying it in a concealed manner, since at the time he "concealed it on his person" there is no evidence that he intended an unlawful act.

Had the petitioner been permitted to introduce the evidence excluded in the trial Court, such evidence would have tended to show at most that he acted in a reckless rather than a knowing manner, if the jury believed his "good faith" in carrying the weapon, and accordingly, he would have been entitled to a charge distinguishing between the culpable mental states of "knowingly" and "recklessly" or "negligently", and should the jury have chosen to believe that he acted recklessly or negligently when he put the gun on his person, rather than knowingly, he would have been entitled to a judgment of acquittal since the requisite mental state of "knowingly" (by inference guilty knowledge) would not have been present to sustain a conviction.

Awareness of what one is doing is a prerequisite for the infliction of punishment. *Morissette* v. *United States,* 342 U.S. 246.

The exclusion of the testimony, in effect changed the weight and balance in the scales of justice. It eased the prosecution's path to conviction by doing away with the requirement of guilty intent. It stripped from petitioner such benefit as he derived at common law from innocence of evil purpose, and circumscribed the freedom heretofore allowed juries.

The law under some circumstances recognizes good faith or blamelessness intent as a defense, partial defense, or as an element to be considered in mitigation of punishment. (footnote 24 *Morissette* v. *United States, supra*).

Appellant concedes that the legislature has the power to make an act criminal regardless of guilty knowledge or intent, *State* v. *Weisberg,* 74 Ohio App. 91, 29 Ohio Op. 274 (1943), and that certain conduct may be defined as criminal although it does not include the element of guilty knowledge. *State* v. *Euclid Fish Company,* 32 Ohio Op. 2d 85, 198 N.E. 2d 776 (1964). Unless it is made clearly to appear that the legislature did not intend to require guilty knowledge in defining crime, however, it will be concluded that guilty knowledge was intended. *State* v. *Huffman,* 131 Ohio St. 27, 5 Ohio Op. 325 (1936). Clearly, certain offenses do not require the element of guilty knowledge, such as speeding or violations of the Pure Food and Drug Act, by way of example. However, the apparent intent of the legislature in enacting the offense of carrying a concealed weapon (R. C. 2923.12) was to make scienter or guilty knowledge an element of the offense. This conclusion is supported by the fact that the legislature saw fit to include in the offense certain circumstances under which the carrying of such a weapon would not be a violation of the law. (R.C. 2923.12 (C) (1-4).

To be guilty of the crime the petitioner must have had knowledge of the fact, though not necessarily the law that

made carrying the weapon concealed a punishable offense. The excluded evidence would have tended to show that his knowledge was otherwise.

The exclusion of the testimony removed from the jury facts on whether or not the petitioner's acts were wrongful. Whether that intent existed, the jury must determine, not only from the act of concealing, but from that together with the testimony of all witnesses having knowledge of the case and the petitioner and all the surrounding circumstances.

An analogy with the instant case may be made by consideration of a case in which an individual is charged with possession of criminal or burglary tools. In the prosecution for unlawful possession of burglar tools, drawing the justifiable inference that the possession of burglar tools by defendant's companion was possession by defendant and that defendant intended to use such tools burglariously, was not improper as predicating an inference on an inference but was drawing two or more inferences from the same facts. *State* v. *Bryan,* 39 Ohio App. 306 (1942). It is significant to note in reviewing this kind of offense that the rationale required some inference that the individual intended to use the burglary tools in an unlawful manner, since mere possession of items which could be described as burglary tools was not sufficient to constitute an offense in and of itself. Petitioner suggests that the same rationale is applicable to this case, for example, in a situation where an individual might have things which could be described as burglary tools in his possession, but there being no evidence from which to draw an inference that he intended to use them unlawfully. Such is analogous to a situation where an individual might have put a weapon which he was in the habit of carrying unlawfully on his person in a reckless manner without any intention to use the weapon

unlawfully, as is petitioner's contention here. His state of mind at the time he put the weapon on his person, and his general state of mind with respect to his carrying the weapon, is significant to a consideration of whether or not this inference can be drawn in the instant case; in other words, there must be some element of criminal intent or guilty knowledge present in the commission of the concealed weapon offense, as implied by the requirement of the element of "knowingly".

There was no evidence to show that petitioner's contention during his direct testimony that he carried the weapon on occasions when he was carrying cash in his possession, or when he was going to his camp, was false. It should have been conceded by the trier of fact that the petitioner could not have known what was going to take place at the West apartment. It is just as likely that his possession of the weapon was reckless as it was with a knowing intent to conduct some criminal activity should he need the weapon during the course of a possible confrontation at the West apartment. There, however, the trier of fact was not permitted to consider evidence tending to show the petitioner's good faith or lack of guilty knowledge, that is his lack of acting "knowingly" as opposed to "recklessly" or "negligently" at the time he put the gun on his person, an exclusion of evidence which operates to his extreme prejudice. The exclusion of the "advice" evidence was quite prejudicial to him because that advice was relevant to one essential element of the offense, i.e. the element of acting "knowingly" or with some kind of scienter or guilty intent. The Court of Appeals perceived the issue to be whether or not the advice that the police officers gave would have caused the petitioner to be more or less aware that he was carrying a weapon concealed on his person; the evidence was not offered on this point as to whether or not he was aware that the weapon was on his person, but

rather on his state of mind at the time he put the weapon on his person, both general and specific. If he put the weapon on his person for a lawful purpose, i.e. by way of example to protect himself while engaged in carrying a large sum of money, then he is not "knowingly" in violation of the concealed weapon statute; if he permits the weapon to remain on his person and thereafter uses the weapon to perpetrate some crime, then it is just and proper that he be charged and convicted of the crime he perpetrates with the weapon, however, unless there is some evidence of guilty knowledge reflecting on the time he put the weapon on his person, he should not be also convicted of carrying a concealed weapon. It would seem hardly necessary to point out the distinction between use of the weapon to conduct an assault or other crime and mere possession of it. *Petitioner suggests it is not sufficient that the State prove that he knew that the weapon was on his person, since this would be a misinterpretation of the intent of the statute.* The required knowledge of the weapon being on his person is of the nature of guilty knowledge. Additionally, because a person's knowledge or intent is subjective, and as a rule, known only to the actor, it is to be determined through inferences based upon the manner in which the act was done, the manner or means used, and "all the other facts and circumstances in evidence" in the same manner as malice. *State* v. *Huffman, supra,* (1936).

It is fundamental in reason and logic that when any fact has a causal connection or logical relation with another fact, so as to make the other fact either more or less probable, the first fact is competent or relevant to prove the second. *Barnett* v. *State,* 104 O.S. 298. In this case, petitioner sought to establish evidence in corroboration of his claim of having a good faith basis for possession of the weapon. The exclusion of this evidence on the basis of its non-relevance or materiality is clearly erroneous where such

evidence is offered to disprove the element of scienter in the offense. Evidence tending to prove an issue, or constitute a link in the chain of proof, is relevant and admissible, although it alone may not justify a verdict in accordance therewith. It is sufficient under the rules of relevancy that the evidence is relevant to some issue in controversy. No rule of evidence requires that what is offered must be relevant to every issue in the case, it may be relevant to one issue and irrelevant to others. *Rose* v. *State,* 13 O.C.C. 342, and *Findlay Brewing Company* v. *Bauer,* 50 Ohio St. 560. A litigant may show all of the circumstances connected with his possession of a weapon, Warton's Criminal Evidence, Sect. 199. The suppression of the "advice" evidence deprived petitioner's jury of facts which were relevant and material to the issue of the petitioner's culpable mental state.

If the jury believed that the weapon was being carried for defensive purposes, or if they chose to believe that petitioner did not act "knowingly" but acted in a reckless or negligent manner, then petitioner would have been entitled to a judgment of or verdict of acquittal. Petitioner's claim that he was engaged in or was going to or from his lawful business or occupation, which business was of such character, or was necessarily carried on in such a manner or at such a time or place as to render the petitioner particularly susceptible to criminal attacks, as would justify a prudent man in going armed, was of such a nature that exclusion of such evidence as would tend to establish the truth of such a claim was highly prejudicial. The petitioner had a right to put before the jury those facts which would tend to show that he was in fact engaged in a lawful business at the time he was carrying the weapon. *Fink* v. *State,* 40 Ohio App. 431, 78 N.E. 700. Petitioner admits that the justification for carrying a concealed weapon under this section requires the establishment by a greater

weight of the evidence that he was so engaged in a lawful business and that the circumstances in which he was placed were of such as would justify a prudent man to carry a weapon for the defense of his person, property or family. *State* v. *Johnson,* 64 O.L.A. 425, 112 N.E. 2d 62. While it is true that such "advice" evidence would not have established an affirmative defense, such evidence would have tended to vitiate the element of "knowingly".

The reasoning of the Court of Appeals to the effect that whatever advice the police officers gave the petitioner about carrying a weapon would not make him more or less aware that he was carrying a weapon concealed on his person lacks judicial insight and is erroneous. The awareness of such a situation must, by linking of the element of "knowingly" with the element of scienter, be coupled with a propensity to act in a manner which within the knowledge of the petitioner was criminal in nature; that is, the jury must have been able to conclude from the evidence that the petitioner was carrying the weapon in and with a state of mind whereby he knew that his act was violative of the law, and that he was acting deliberately in spite of this knowledge. The issue as to whether he acted knowingly or whether he acted recklessly or negligently could not be resolved by the jury since that issue was not before it as a result of the exclusion of the "advice" evidence.

It is not sufficient that a person charged with carrying a concealed weapon merely know that he is carrying a weapon concealed on his person, there must be the additional element that his knowledge that he was carrying a weapon concealed on his person was in fact "guilty knowledge"; assuming, arguendo, that petitioner's claim of acting in good faith and without any knowledge that he was violating the law was correct, then the jury would have been entitled to find an absence of the element of "know-

ingly" within the full meaning of that term, not the limited meaning assigned by the Court of Appeals.

It is for this reason that petitioner urges that he did not have a full and fair hearing due to the exclusion of such evidence.

CONCLUSION

The Court of Appeals decision has cast a cloud on the law of culpable mental states. This Court is respectfully urged to issue the writ of certiorari to review the judgment below and to correct the error that has been permitted to violate the due process of law clause and thereby subject the petitioner to an unfair and unlawful punishment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that 3 copies of this Petition for Writ of Certiorari were served by ordinary U.S. mail on July 9, 1980, addressed to:

ROBERT A. JONES
Prosecutor of Clermont County
154 Main Street
Batavia, Ohio 45103

JAMES R. RIMEDIO

APPENDIX A I

THE SUPREME COURT OF OHIO

No. 80-227

THE STATE OF OHIO,)
)
City of Columbus.)

1980 TERM
To wit: April 3, 1980

STATE OF OHIO,

Appellee,

vs.

PHILLIP E. STEVENS,

Appellant.

APPEAL FROM THE COURT OF APPEALS FOR CLERMONT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Clermont County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Clermont County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this.....day of..... 19..

.....Clerk
.....Deputy

APPENDIX A II

THE SUPREME COURT OF THE
STATE OF OHIO

No. 80-227

THE STATE OF OHIO,)
)
City of Columbus.)

1980 TERM
To wit: April 3, 1980

STATE OF OHIO,

Appellee,

vs.

PHILIP E. STEVENS,

Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CLERMONT COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Jim Rimedio.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this.....day of..... 19..
..... Clerk
..... Deputy

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY, OHIO

No. 835

STATE OF OHIO,

Plaintiff-Appellee,

vs.

PHILLIP E. STEVENS,

Defendant-Appellant.

DECISION

(Filed December 19, 1979)

Mr. Robert A. Jones, Prosecuting Attorney, and Mses. Patricia L. Herbold and Stephanie Wyler, Assistant Prosecuting Attorneys, 154 Main Street, Batavia, Ohio 45103, for Plaintiff-Appellee,

Mr. Jim Rimedio, 914 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas, Clermont County, Ohio, the transcripts of the proceedings, the briefs and the arguments of counsel.

Defendant appeals from his jury conviction of carrying a concealed weapon (loaded) in violation of R. C. 2923.12, and from the overruling of his motion for a new trial. He assigns as errors the denial of his motion to suppress and the exclusion from evidence of certain testimony about advice given to him by police officials about carrying a gun. Finding no merit in either claim, we affirm.

The record discloses that on the night in question defendant spoke by telephone to Patricia West who was upset by the loud playing of records in an apartment below hers. Defendant was at one of his two places of business. He decided he would go over to West's apartment and help her with the problem. He had a check and some money to place in a night depository at a bank, and he testified that he intended later to stop by his river camp to determine whether it was secure. He made the bank run and then went to the apartment complex. He had been carrying a loaded .38 calibre Smith & Wesson revolver on the seat of the car, and when he stopped at the apartment building, he put this in his belt under his overcoat. He knocked on the door of the apartment in which the stereo had been playing and engaged in a heated conversation with the tenant, Mr. Keoler. Defendant claims that Keoler had a pool cue in his hand and threatened defendant's life. Mrs. Keoler pulled her husband back into the apartment. A tenant from across the hall, Diana York, then saw the defendant pull the weapon from under his coat and point it at the closed door for five to ten seconds. Miss York called the police and reported what she had seen.

The police responded to the apartment building when the police dispatcher signalled them to investigate a fight and a man with a gun. They spoke with the Keolers and Miss York. They reasonably believed they would be confronted by a drunk with a gun who tried to pick a

fight. When they knocked on West's door, the defendant opened it. Police asked him to step into the hall, and frisked him for a weapon. None was found. At the request of the police, West consented to their entering the apartment. One officer saw the revolver in a holster lying openly on a bookcase in the apartment and he "secured" it.

The motion to suppress was properly overruled. The officers were lawfully conducting an investigation of a man with a gun and they were properly inside the apartment by consent of the tenant. They saw the weapon in plain view. Its incriminating nature was immediately apparent under the circumstances. *State* v. *Williams* (1978), 55 Ohio St. 2d 82, 377 N.E.2d 1013; *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443; *Harris* v. *United States* (1968), 390 U.S. 284. The first assignment is meritless.

In his second assignment defendant asserts the court erred in excluding testimony by three police officers from different jurisdictions that they told the defendant he could carry a weapon for protection of his own property or for business purposes so long as he was not a convicted felon. Defendant claims that this excluded evidence was crucial to his position that he did not have the culpable mental state required for conviction of carrying a concealed weapon. That culpable mental state is "knowingly," which amounts to an awareness that his conduct was probably of a certain nature or that certain circumstances probably existed. R. C. 2923.12; R. C. 2901.22 (B). The exclusion of the "advice" evidence was not prejudicial to defendant because that advice was not relevant to the essential elements of the offense. Whatever advice the police officers gave the defendant about carrying a weapon could not cause him to be less aware or more aware that he was carrying a weapon concealed on his person.

Defendant's justification was that he carried the weapon

for defensive purposes while engaged in lawful business under circumstances when he was particularly susceptible to criminal attack and that he carried it for defensive purposes while engaged in a lawful activity with reasonable cause to fear attack upon himself or his river camp. R. C. 2923.12 (C) (1) and (2). These defenses presented the substance of defendant's claim that he was innocent of wrongdoing. He admitted that he knowingly had the weapon concealed on his person and that he pulled it from its hiding place, but he claimed that he did so only because the Keolers were so hotly engaged in an argument with each other that he stood ready to intercede. Defendant had full oportunity to present his defenses. The court properly instructed the jury on them. The jury nevertheless found defendant guilty. Police advice could not relieve him of his obligations under the criminal law. The second assignment is without merit.

We affirm.

KEEFE, P. J., BETTMAN and BLACK, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

STATUTES

§ 2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC § 2901.05 (124 v 14), repealed 134 v H 511, § 2, Eff 1-1-74.

§ 2901.22—Culpable mental states.

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element.

When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

HISTORY: 134 v H 511. Eff 1-1-74.

§ 2923.12 Carrying concealed weapons.

(A) No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance.

(B) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to law enforcement officers, authorized to carry concealed weapons or dangerous ordnance, and acting within the scope of their duties.

(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon himself or a member of his family, or upon

his home, such as would justify a prudent man in going armed.

(3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in his own home.

(4) The weapon was being transported in a motor vehicle for any lawful purpose, and was not on the actor's person, and, if the weapon was a firearm, was carried in compliance with the applicable requirements of division (C) of section 2923.16 of the Revised Code.

(D) Whoever violates this section is guilty of carrying concealed weapons, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of any offense of violence, or if the weapon involved is a firearm which is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, then carrying concealed weapons is a felony of the third degree. If the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons is a felony of the second degree.

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No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1980 TERM

PHILIP E. STEVENS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari to The Court of Appeals
First Appellate District of Ohio
Clermont County, Ohio

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

On March 4, 1978, Petitioner left his restaurant in Milford, Clermont County, Ohio and drove to an auto body shop which he owned. In his vehicle, on the front seat, Petitioner had a Model 64 stainless steel .38 caliber Smith and Wesson revolver, which was loaded. He telephoned a friend's apartment, whereupon said friend, Patricia West, complained about loud music coming from the apartment

below hers. Petitioner replied that he would come to Ms. West's apartment building to help her with the problem. On his way to the apartment, Petitioner made a deposit at the night depository of his bank.

When Petitioner arrived at the apartment building, at approximately 10:30 P.M. he went to the apartment located below Ms. West's apartment. The resident, Larry Keoler, answered the door with a billards cue in his hand, as he and his wife were playing a game of billiards. A verbal confrontation ensued between Petitioner and Mr. Keoler regarding the loud music. The altercation attracted the resident of the apartment across the hall, Deanna York. Looking through the peephole in her door, Ms. York observed Mrs. Keoler pull her husband into their apartment, then close and lock the door. Ms. York then observed the Petitioner remove a gun from under his coat, point the gun at the Keoler's door for five to ten seconds, return the gun to coat, and proceed upstairs. When Ms. York advised the Keolers of this, they telephoned the police.

When the police responded, after questioning Ms. York and the Keolers, they proceeded to Ms. West's apartment. Upon obtaining consent of Ms. West to a search of her apartment, the officers discovered a revolver in the living room. Said revolver was positively identified by Ms. York as the gun which she observed in Petitioner's possession.

On April 5, 1978, Petitioner was indicted by the Grand Jury of Clermont County, Ohio for carrying a concealed weapon, contrary to and in violation of Section 2923.12 of the Ohio Revised Code. Petitioner entered a plea of not guilty. The motion to suppress evidence, filed by Petitioner, was heard and subsequently overruled.

At the trial by jury, commencing on October 13, 1978,

Petitioner sought to introduce into evidence testimony by three police officers that they had advised petitioner of his right to carry a weapon and the circumstances under which he could properly do so. The trial court sustained the prosecution's objection to such testimony.

In its instructions to the jury, the trial court included an instruction regarding the affirmative defense of justification to the offense of carrying a concealed weapon. The jury returned a verdict of guilty.

SUMMARY OF ARGUMENT

The trial court properly refused evidence offered by Petitioner regarding police officers' advice to him that he could carry a weapon under certain circumstances. Police officers are not qualified to advise an individual of his legal right to carry a weapon. Such testimony may have been prejudicial by giving the jurors the erroneous impression that the Petitioner was acting pursuant to proper legal advice. Furthermore, even if Petitioner had been misinformed, mistake as to law is no defense where the offense in question requires only that the offender act knowingly, regardless of purpose.

The trial court instructed the jury on the affirmative defense of justification. Where evidence is conflicting as to whether a defendant was justified in carrying a weapon, so that reasonable minds might arrive at different conclusions, a finding of guilty is not prejudicial error.

ARGUMENT OF LAW

Ohio Revised Code Section 2901.22 (B) provides in pertinent part:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature."

Carrying a concealed weapon, in violation of Ohio Revised Code Section 2923.12, requires that the person act "knowingly," meaning with regard to the particular offense in question, that the person is aware that he is carrying a weapon and that the manner in which he is carrying it will probably result in its being concealed. Irrespective of any other evidence presented at trial, Petitioner himself supplied the answer to the question as to whether he had the requisite degree of culpability.

> Q. You did, knowingly, have concealed on your person a loaded 38 caliber gun. Am I not correct in that statement?
>
> A. Yes, sir, you are.

By way of justification, Petitioner introduced evidence regarding his various business ventures, his ownership of a camp which had been vandalized on several occasions, his late and irregular working hours, and the fact that he occasionally made deposits of money late at night. In fact, all three police officers who responded to the radio dispatch of a "man with a gun", testified that Petitioner told them many of these same facts when they observed and seized his gun, and that Petitioner also told them that he had received permission from other police departments to carry a weapon. In conjunction with Petitioner's testi-

mony as to the route he took and the time schedule he followed on the night of the offense, the evidence which may have constituted an affirmative defense to the charge was before the jury, and it was within their province to determine whether, under all the circumstances, a justification for Petitioner carrying a concealed weapon existed at the time in question. In light of the trial court's instruction regarding the affirmative defense of justification, the jury could not have found Petitioner guilty if they found that there was a justification.

Where, at the trial of a person charged with carrying a concealed weapon, the evidence is conflicting as to whether he was justified in carrying the weapon, so that reasonable minds might arrive at different conclusions, and there is substantial credible evidence of probative value from which the jury could properly determine that no justification existed, a finding of guilty is not prejudicial error. *State* v. *Hall,* 6 Ohio App. 2d 114, 215 N.E. 2d 635 (1964).

In the instant case, Petitioner had left his various places of business, had passed within several hundred yards of one of the branch offices of his bank on his way home, then left home, made a deposit at a different branch on his way to the apartment of his friend, Patricia West. He explained that he felt it necessary to carry the gun into the apartment because his vehicle wasn't secure, even though he had left the gun in the truck when he was at one of his businesses. He testified that it was his intention to check his camp after he left Ms. West's and that he needed the gun for his safety. The jury obviously didn't find the Petitioner's testimony to be credible as it related to his justification for carrying the gun. "One cannot, simply because he may have been justified at the time he first carried the concealed weapon, claim justification at a later time, in a completely different factual contest, when the

facts and circumstances originally constituting justification no longer apply." *State* v. *Johnson*, 60 Ohio Op. 2d 301, 283 N.E. 2d 452 (1972).

In order to substantiate his allegation that he had been advised by "other police departments" that he could carry a weapon, three defense witnesses were called who were or had been police officers. Defense counsel asked each of them what conversations they had had with Petitioner regarding his carrying a weapon. The prosecutor objected and the objections were sustained. The testimony of these witnesses as to their advice to Petitioner was irrelevant because they were not qualified to advise him as to his legal status with respect to carrying a weapon, and being police officers, their testimony may have been prejudicial by creating in the minds of the jurors the erroneous impression that Petitioner was acting pursuant to proper legal advice. Even if Petitioner was misinformed, his mistake as to the law is no defense to a charge which requires only that he act "knowingly, regardless of his purpose."

In *State* v. *Wenger*, 58 Ohio St. 2d 336, 390 N.E. 2d 801 (1979), the Appellant argued that because he was mistaken as to the factual circumstances, he lacked criminal mens rea. The Supreme Court of Ohio held that where the degree of culpability is "knowingly", motive, purpose or mistake of fact is of no significance. In the instant case, Petitioner's interpretation as to his right to carry a weapon is not one of the affirmative defenses provided for in the statute, irrespective of the course of his mistaken belief, unless, of course, one of the justifications provided by statute existed at the time in question, which the jury did not find. Therefore, the testimony of witnesses who may have been the source of his belief was irrelevant and properly disallowed by the trial court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court deny Petitioner's writ of certiorari to review the judgment of the Court of Appeals for the First Appellate District of Ohio.

Respectfully submitted,

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